

INTERNATIONAL HEALTH GOVERNANCE SYMPOSIUM

The Human Right to Health in Africa: Great Expectations, but Poor Results

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Thirty years after the entry into force of the African Charter on Human and Peoples' Rights (ACHPR), the protection of human rights still encounters many difficulties in the majority of the African States. Above all, the implementation of the 'second generation' human rights seems largely unrealistic, in spite of the great expectations emerging from the pertaining legal texts. The human right to health, enshrined in Article 16 of the ACHPR, represents a telling example of the said situation. Furthermore, the human right to health is explanatory of the contradiction frequently marking the practice of the African Commission, which usually interprets economic and social rights in a broad and detailed manner, while absolving the African States for their limited implementation.

Great Expectations

Article 16 states that every individual shall have the right to enjoy the best attainable state of physical and mental health. It adds that States Parties shall take all the necessary

measures to protect the health of their populations and to ensure that they receive medical attention when they need it.

A Working Group of the African Commission attached particular importance to the human right to health, when in 2011 it codified the Guidelines and Principles on Economic, Social and Cultural Rights in Africa. According to these Guidelines, the human right to health does not simply mean that everyone has the right to be healthy. It entails the right of each person to benefit, without any discrimination, from the underlying determinants of health, which include: access to safe and potable water; adequate supply of safe food; healthy housing, occupational and environmental conditions; access to health-related education and information, including sexual health; the freedom from unwarranted medical treatments; the fruition of an effective national healthcare system. As a consequence, States Parties to the ACHPR have to supply their populations with the aforementioned determinants of health. However, the Guidelines are a mere soft law instrument, thus not legally binding.

The African Commission itself has often stressed the importance of the protection of the human right to health on the Continent. The report concerning the case of the Mental Health in The Gambia is the most remarkable in this regard. The claimants had denounced The Gambia for the violation of the human right to health and other rights because of the Lunatic Detention Act, which ordered the detention in psychiatric jails of Gambians affected by mental insanity. In its report, the African Commission placed the human right to health in a position of superiority in comparison with the other human rights enshrined in the ACHPR. It stated that the enjoyment of such a right is *vital* to all aspects of a

person's life and wellbeing and is *crucial* to the realisation of the other human rights (Paragraphs 80-81). In the case of the Four Women Journalists, two NGOs complained of the violations suffered by four women, raped while documenting a strike in Egypt. In its report, the African Commission reiterated that the human right to health operates, directly or indirectly, as a prerequisite to the other human rights (Paragraph 261). Finally, the African Commission reaffirmed its views in the recent report relating to the case of the Human Rights Defenders (Paragraphs 134-135). The communication concerned three human rights activists, who suffered health injuries. The authorities of The Sudan had arrested and tortured them, because suspected of conspiracy against President al-Bashir.

Poor results

Actually, the practice of the African States, confirmed by several studies and official statistics (see here and here), easily shows that the great expectations about the human right to health have not been met. The States do not fully implement (or do not implement at all) the human right to health. Furthermore, the main national practices also show a clear tendency that in practice neither concrete nor targeted steps are taken in order to realise the human right to health.

Although this deplorable state of health may be blamed on a multitude of factors, two of them seem particularly critical. The first is the acute shortage of expertise in almost all the African States. The second is linked to the management of the capitals invested by international donors for the development of the Continental welfare. Many African governments seem either unwilling or unable to come to the

aid of their populations by means of the resources granted from abroad.

Indeed, in spite of its statements in the three abovementioned reports, the African Commission itself declared to be aware of the numerous difficulties underlying the implementation of the human right to health in Africa. It admitted that millions of Africans are not enjoying the right to health, mainly because they are generally faced with the problem of poverty. Meanwhile, their national States are not able to provide the necessary amenities, infrastructure and resources in order to facilitate the full enjoyment of this right. Therefore, in the case of the Mental Health in The Gambia, the African Commission considered Article 16 of the ACHPR as containing *programmatic* and *progressive* obligations for the States Parties (Paragraph 84). In other words, the African States have to take concrete and targeted steps according to their available resources in order to realise the human right to health. The African Commission reached very similar outcomes in the reports pertaining to the cases of the Four Women Journalist (Paragraph 264) and of the Human Rights Defenders (Paragraph 136).

Thus, a contradiction marks the African Commission's reasoning. The aspiration to let people broadly benefit from the right to health, considered *vital* and *crucial*, cannot be reconciled with the *programmatic* and *progressive* nature of the obligations of the African States relating to the implementation of the human right to health. Precisely, the human right to health cannot be vital and, meanwhile, also programmatic. One could argue that such qualification of the States' obligations reveals an attempt of the African Commission to disguise the poor results effectively following

the great expectations concerning the human right to health in Africa.

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